No. 87-1031

In The Supreme Court of the United States

October Term, 1987

G. P. REED,

Petitioner,

v.

UNITED TRANSPORTATION UNION, etc.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

JOINT APPENDIX

CLINTON J. MILLER, III*
Assistant General Counsel
United Transportation Union
14600 Detroit Avenue
Cleveland, OH 44107-4250

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JOHN W. GRESHAM
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Charlotte, NC 28202

Counsel for Petitioner

* Counsel of Record

PETITION FOR CERTIORARI FILED DECEMBER 16, 1987
CERTIORARI GRANTED MARCH 7, 1988

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The following Opinions, Decisions, Judgments and Orders have been omitted in printing the Joint Appendix because they appear in the following pages in the Appendix to the printed Petition for Certiorari.

RELEVANT DOCKET ENTRIES

Date	NR.	Proceedings
1985		
08-02	# 1	COMPLAINT—
08-02		Summons Iss.—Serv. for four of S&C handed to Atty for serv. JS 5 Iss.—
08-30	# 3	ANSWER OF DEFTS
11-15	# 8	MOTION OF DEFTS TO DISMISS OR FOR SUMMARY JUDGMENT (sent to RDP)
1986		
05-01	# 20	ORDER—RDP—1. The defts motion to dismiss the pltfs claim pursuant to 29 USC 411 is Denied; 2. Because the court is satisfied that its ruling on the timeliness of the pltfs claim under 29 USC 411 involves a controlling question of law as to which there is substantial ground for difference of opinion & that an immediate appeal from this ruling may advance the ultimate termination of the litigation, the defts may apply to the U.S. Court of Appeals for the Fourth Circuit within 10 days of the date this order is filed for permission to appeal this ruling pursuant to 28 USC 1292(b); 3. The defts Motion to dismiss the pltfs claim pursuant to 29 USC 501 is Granted; 4. The defts Motion to dismiss the pltfs state law claims is Denied; and 5. Should the defts apply for an interlocutory appeal pursuant to 28 USC 1292(b), that application shall stay all proceedings in this Court. cc: Attys CO VOL XXXI-A, (p) 129

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH
CAROLINA CHARLOTTE DIVISION

G. P. REED, Plaintiff, v. UNITED TRANSPORTATION UNION, FRED A. HARDIN, K. R. MOORE and J. L. McKINNEY, Defendants.	)	CIVIL ACTION NO. C-C-55-477-P (Filed Aug. 2, 1985)

COMPLAINT

JURISDICTION

1. This is an action to enforce the rights of a member of a labor organization as guaranteed by 29 U.S.C. § 411 and § 501. Jurisdiction is asserted pursuant to 29 U.S.C. §§ 412 and 501 and pursuant to 28 U.S.C. § 1331.

Plaintiff also seeks a declaratory judgment of his rights under the pertinent statutes and jurisdiction is therefore asserted under 28 U.S.C. § 2201 and § 2202.

Plaintiff further invokes the pendant jurisdiction of the Court.

PARTIES

2.. Plaintiff is a citizen and resident of the United States now residing in Mecklenburg County, North Carolina.

3. The defendant United Transportation Union ("UTU") is a labor organization within the meaning of 29 U.S.C. § 401 *et seq.* with its principle place of business in Cleveland, Ohio.

4. The defendant Fred A. Hardin is the President of UTU and is a citizen and resident of Cleveland, Ohio.

5. The defendant K. R. Moore is a Vice President of UTU and is a citizen and resident of Cleveland, Ohio.

6. The defendant J. L. McKinney is an International Auditor of UTU and is a citizen and resident of Evans, Georgia.

FACTS

7. The plaintiff, at all times pertinent to this action, has served as the Treasurer of Local 1715 of the UTU.

8. Subsequent to the audit in late August of 1982 plaintiff was informed by defendant McKinney that claims for lost time previously made by plaintiff and paid by the Local in the amount of $1,210.10 would be disallowed and plaintiff would be required to reimburse this amount to the Local. The reason given for this decision was that plaintiff was required to get the "prior approval" of the Local before undertaking any Local business that would require lost time.

9. No such "prior approval" requirement had ever been communicated to plaintiff who had followed the standard practice of submitting his lost time claim to the Local for approval after the claim occurred but prior to payment. Plaintiff had handled his lost time claim in precisely the same manner as he handled lost time claims for

all Local officers and members. Plaintiff appealed the rejection of his claims to defendant Hardin who rejected the appeal again citing unspecified "regulations" which have never been furnished to plaintiff.

10. Subsequently, plaintiff sought to further appeal the rejection of his claim through defendant Moore. Again, the appeal was denied with no explanation.

11. Subsequent to the audit plaintiff has been required by defendant Hardin to pay claims of Local officers and members which did not have prior approval. This requirement is in direct contravention of the "regulations" applied to plaintiff's claims. The actions by defendants Hardin, Moore and McKinney are wilful and conscious acts by these defendants to discourage plaintiff from participating in Local activities and in holding office in the Local.

12. Defendants Hardin and Moore have consistently acted in support of the actions of A. Fred Warlick, General Chairman of Local 1715. Whenever plaintiff has sought to adhere to the constitution and regulations of the defendant UTU and the Local and to oppose acts by Warlick which were in contravention of the constitution and regulations of the defendant and Local 1715, defendant Hardin and Moore have supported Warlick.

CAUSES OF ACTION

13. The actions by the defendants in requiring plaintiff to reimburse the Local for claims previously paid in accordance with policy and practice is a effort by defendants to deprive plaintiff of his equal rights and privileges guaranteed by 29 U.S.C. § 411.

14. The actions by the defendants constitute a violation of the fiduciary responsibilities of labor organizations imposed on defendants by 29 U.S.C. § 501.

15. Plaintiff has exhausted the remedies available to him through the procedures of UTU. Further resort to any such remedies are futile.

16. The actions by defendants also constitute a breach of defendant UTU's implied contract with plaintiff as Local Treasurer or in the alternative plaintiff asserts a claim of quantum meruit for services rendered to defendant UTU.

RELIEF

Plaintiff prays that the Court:

17. Issue a declaratory judgment declaring the acts of the defendants to be unlawful.

18. Enjoin the unlawful acts of the defendants.

19. Award the plaintiff damages, including but not limited to, the lost claims in the amount of $1,210.20.

20. Award the plaintiff his costs, expenses and reasonable attorneys' fees.

21. Award plaintiff such other relief as the Court may deem just and proper.

This 2nd day of August, 1985.

Respectfully submitted,

/s/ JOHN W. GRESHAM
JOHN W. GRESHAM
Ferguson, Watt, Wallas & Adkins, P.A.
Suite 730 East Independence Plaza
951 South Independence Boulevard
Charlotte, North Carolina 28202
704/375-8461

Attorney for Plaintiff

(Request for Jury Trial omitted in printing)

(Certificate of Service omitted in printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
NORTH CAROLINA
CHARLOTTE DIVISION

(Caption omitted in printing)

ANSWER OF DEFENDANTS

Defendants herein, by their undersigned counsel, submit the following as and for their answer to the Complaint filed herein.

FIRST DEFENSE

Defendants respond to the numbered paragraphs of the complaint as follows.

1. This paragraph contains jurisdictional allegations requiring no response; but to the extent that a response may be deemed to be required, deny.

2. Admit based upon information and belief.

3. Admit that Defendant United Transportation Union ("UTU") is an unincorporated labor organization having its international headquarters at Cleveland, Ohio, and that it is the duly designated representative of certain employees of certain employers primarily in the transportation industry under both the Railway Labor Act (45 U.S.C. 151 *et seq.*) and the Labor Management Relations Act (29 U.S.C. 141 *et seq.*)

4.-7. Admit.

8. Admit that International Auditor J. L. McKinney conducted an audit of Local 1715 from August 26, 1982 through September 1, 1982, and that the findings that Plaintiff had to repay Local 1715 $1,210.20 were based upon a finding that Plaintiff was salaried by the local at $250.00 per month, and that when that sum was raised from $190.00 in 1980, the local did not allow payment for

any sums over and above $250.00 for performing the functions of Secretary-Treasurer. Deny remaining allegations.

9-10. Deny, and refer the Court to the letter of Plaintiff to Defendant Hardin dated September 6, 1982, and Defendant Hardin's response dated October 1, 1982, attached hereto as Exhibits 1 and 2, respectively.

11.-16. Deny.

17.-21. Plaintiff is not entitled to the relief requested or to any relief whatsoever from Defendants.

Any allegation of the Complaint not admitted, denied or modified, is hereby denied.

SECOND DEFENSE

The Court lacks subject matter jurisdiction over all or portions of the allegations in the Complaint.

THIRD DEFENSE

The Complaint fails to state a claim for relief against Defendants.

FOURTH DEFENSE

The Complaint has been brought outside the applicable statutes of limitations.

FIFTH DEFENSE

Plaintiff has failed to exhaust his internal union remedies.

SIXTH DEFENSE

Plaintiff has failed to exhaust his administrative remedies.

SEVENTH DEFENSE

The Complaint is barred by the equitable doctrine of laches.

WHEREFORE, Defendants pray the Court to dismiss this action, award them their costs and attorney's fees and such further relief as may be proper.

Respectfully submitted,

/s/ .....
Clinton J. Miller, III
Assistant General Counsel
United Transportation Union
14600 Detroit Avenue
Cleveland, OH 44107
(216) 228-9400

/s/ .....
J. David James
Jonathan R. Harkavy
Smith, Patterson, Follin, Curtis,
James & Harkavy
700 Southeastern Building
Greensboro, NC 27401
(919) 274-2992

(Certificate of Service omitted in printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
NORTH CAROLINA
CHARLOTTE DIVISION

(Caption omitted in printing)

MOTION OF DEFENDANTS TO DISMISS, OR
FOR SUMMARY JUDGMENT

Defendants herein respectfully move the Court, pursuant to *Fed. R. Civ. Pro.* 12(b)(1)(6), to dismiss the Complaint filed herein on the following independent grounds:

(1) Plaintiff has failed to file the complaint within the applicable six-month statute of limitations;

(2) Plaintiff has failed to exhaust available internal union remedies;

(3) Plaintiff has failed to state a claim for relief in the complaint;

(4) Plaintiff's claims under implied contract and quantum meruit theories are outside of the subject matter of jurisdiction of the court.

In the alternative, should the Court consider documents outside the pleadings, then, pursuant to *Fed. R. Civ. Pro.* 12(b) and 56, Defendants respectfully move the Court for summary judgment of dismissal of the complaint, there being no genuine issue as to any material fact, and defendants being entitled to judgment as a matter of law on one or more of the independent grounds noted above.

A memorandum of points and authorities in support of this motion with accompanying affidavits is being filed herewith.

Respectfully submitted,

/s/ Clinton J. Miller, III

Clinton J. Miller, III
Assistant General Counsel
United Transportation Union
14600 Detroit Avenue
Cleveland, OH 44107
(216) 228-9400

J. David James
Smith, Patterson, Follin, Curtis
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700 Southeastern Building
Greensboro, NC 27401
(919) 274-2992

Attorneys for Defendants

(Certificate of Service omitted in printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
NORTH CAROLINA
CHARLOTTE DIVISION

(Caption omitted in printing)

AFFIDAVIT OF KENNETH N. FOUTS

I, Kenneth N. Fouts, pursuant to 28 U.S.C. 1746, and under penalty of perjury, do state that the following facts are true and correct.

1. I am Section Head, Files and Records of the United Transportation Union (hereinafter, "UTU") and have held that position since February, 1980;
2. That in such position I am the official custodian of correspondence and materials sent to the President of the UTU and by the President of the UTU, which are retained in the President's file room;
3. That the exhibits attached hereto as described below are true copies of originals contained in the President's file room;
   a. Letter dated August 14, 1982 from Pat Clark, Member Local 1715, to UTU President Hardin;
   b. Letter dated August 23, 1982 from UTU President Hardin to G. P. Reed, Treasurer Local 1715;
   c. Letter dated September 2, 1982 from UTU International Auditor J. L. McKinney to UTU President Hardin;
   d. Letter dated September 6, 1982 from G. P. Reed, Treasurer Local 1715, to UTU President Hardin;
   e. Letter dated October 1, 1982 from UTU President Hardin to G. P. Reed, Treasurer Local 1715;
   f. Letter dated July 18, 1983 from John Gresham, Esq. to UTU President Hardin;

AFFIDAVIT OF KENNTH N. FOUTS (cont'd.)

   g. Letter dated July 22, 1983 from UTU President Hardin to John Gresham, Esq.;
   h. Letter dated August 2, 1983 from John Gresham, Esq. to UTU President Hardin.

Executed on November 5, 1985.

/s/ Kenneth N. Fouts
Kenneth N. Fouts

August 14, 1982
1818 Progress Lane
Charlotte, North Carolina 28205

Mr. Fred A. Hardin
President
United Transportation Union
14600 Detroit Avenue
Cleveland, Ohio 44107

Dear Mr. Hardin:

I am writing this letter to you due to my concerns for the future of Local 1715, United Transportation Union. As you know, Transit Management of Charlotte, Inc. has created an enormous expense on our Local by forcing the Committee of Adjustment into almost continuous battles, handling the grievances which arise and numerous arbitration cases and charges with the National Labor Relations Board. This has exhausted the committee's funds to the point where the drivers committee did not get paid for the time they lost for the month of July, 1982; although I believe the Local has approximately $5,000.00 in the General Fund.

Mr. G. P. Reed, the Local's Secretary and Treasurer, in my opinion is very reluctant to allow a vote to raise the Committee Assessment so as to have money to operate on. This action on Mr. Reed's part is playing into the hands of the Company, as I see it. The current Labor Agreement expires January 31, 1983, which is only five (5) months away. It is a known fact the Committee cannot lose the necessary time required to negotiate a Labor Agreement without being reimbursed for the time lost. Mr. Reed is being paid $250.00 per month salary by Local 1715 to handle the Secretary and Treasurer job. We have reason to believe that Mr. Reed is billing the local in addition for time lost to file his reports and sell insurance, most of which is on his off days.

I am asking for an investigation in these matters by the International to find out if there are any misunderstandings in the way the money is being appropriated and spent, and to help get this Local back on the right track before it is too late. I request an audit be done in the presence of the Local's President and the General Chairman of the Committee of Adjustments.

I believe that our problems are political since some of our members have been told in a gossip fashion by Mr. Reed that the General Chairman has been taking off too much time, and that there is no need for additional assessment, not to mention many conflicts that arise in similar fashions almost daily.

The records will show that the General Chairman withdrew five (5) grievances from arbitration in favor of a National Labor Relations Board settlement in which all decisions

were in favor of the Union which saved the Local several thousand dollars in arbitration cost.

The General Chairman has worked numerous hours on his own time without billing the Local for such, and he certainly deserves pay for the hours he lost and the expense he paid out of his pocket during the long National Labor Relations Board proceedings during the month of July this year.

I thank you for your cooperation in this matter.

Fraternally yours,

/s/ Patrick Clark
Patrick Clark

CC: Mr. J. H. Shepherd
Mr. Kenneth R. Moore

August 23, 1982

Mr. G. P. Reed
LC&S&T—Local 1715
3349 Maywood Drive
Charlotte, NC 28205

Dear Sir and Brother:

This is to advise you and your local that I have today assigned Brother J. L. McKinney, International Auditor, to audit the books and records of Local 1715.

I am sure Brother McKinney will notify you when he can arrange his schedule to make this audit.

Your cooperation and any courtesies extended to Brother McKinney will be greatly appreciated by the undersigned.

With best wishes, I am

Fraternally yours,

/s/ Fred A. Hardin
President

cc: Mr. J. H. Shepherd, GS&T
Mr. K. R. Moore, VP-UTU
Mr. Paul Gillard, Jr., Pres. 1715
Mr. A. Fred Warlick, LC 1715
Mr. Telphia Beatty, Jr., LR 1715
Mr. P. O. Clark, Mbr. 1715
Mr. H. L. Hunter, FS

bc: Mr. J. L. McKinney, International Auditor

September 2, 1982

Mr. Fred A. Hardin, President
United Transportation Union
14600 Detroit Ave.
Cleveland, Ohio 44107

Dear Sir and Brother:

Re: Audit No. 112-A—Local 1715

I departed Evans Georgia August 26, 1982, at 9:30 AM, enroute to the Augusta airport, and departed by Atlantis Airlines at 10:15 AM, enroute to Charlotte, North Carolina arriving at 11:10 AM, to begin the audit of Local 1715.

I audited on August 26, 27, 28, 29, 30, 31, September 1.

I was met in Charlotte by General Chairman Warlick, and discussed the problems of Local 1715.

Brother Paul Reed, Secretary & Treasurer of Local 1715 was called and he brought the books and records to me at once, and I began the audit.

After talking to both Brother Reed and Brother Warlick I soon found out that they have quite a feud going on between them. It seems that each one of them is accusing each other of spending too much money.

The expenses of the Drivers committee are very high, and it seems to me the reason for this is that whenever there is a hearing or investigation the entire committee marks off from work, and attends the hearing. Then each one of them is then paid for time lost. This is causing a big burden on the committee funds, as the assessments are only $5.50 per month. This has been going on for some time and as of now the committee funds are in the red in the amount of $2,300.00 I had the committee in for a talk and I explained to them why the fund was in the red. At this time they told me that they was going to have the committee assessments increased as soon as possible. All bills and time lost for the committee was approved in the Local.

I found that Brother Reed had been taking some days off to do Local book work, just as Mrs. Patrick Clark had accused him of doing. Brother Reed also mark off his regular job once every month to attend the Local meeting, and also the President of the local was doing the same. They were both being paid for time lost on both of these days.

The days that Brother Reed mark off for book work, and for reasons that was not explained on the checks were not allowed during the audit, and Brother Reed repaid the Local this amount that came to $1,210.20. I disallowed these checks because he was getting a monthly salary in the amount of $250.00 per month, which is a little above

the average for a local the size of his local. Also in the first part of 1980 the local increase his salary from $190.00 per month to $250.00 per month, and did not allow for any time lost to do book work or at least I could not find any record of it. I feel that if he needed some time he could have used the one day per month that lost to attend the morning meeting. In fact some of the days there was not enough members present to hold a meeting therefore Brother Reed would have had the entire day to do book work.

I called the President of the local and had him in so that I could discuss some of the local's problems with him. Both he and Brother Reed was present at the time, and I told them that they would need to see that the Committee assessments were raised enough to get the committee out of the red, and keep it in the black so that it would not get back in this shape again.

All dues are being collected by Brother Reed, and he is keep all books and records as required.

The audit being completed on September 1, 1982, I departed Charlotte on September 1, at 2:10 PM, arriving Augusta Airport by Atlantis Airlines at 3:00 PM, and then on to Evans Georgia, at 3:30 PM.

Fraternally Yours,

J. L. McKinney
International Auditor

Charlotte, NC
September 6, 1982
Local 1715

Mr. Fred A. Hardin, President
United Transportation Union
14600 Detroit Avenue
Cleveland, Ohio 44107

Dear Sir and Brother:

An audit of the books of Local 1715 has been completed. The International Auditor, J. L. McKinney, has disallowed time claimed by me totaling $1,210.20 that was approved by the Local. All concerned were satisfied at the time these bills were presented.

Brother McKinney said I should have had prior permission before taking the time off that he disallowed. I do not understand this because I thought I was generally acquainted with the policies. I have never received any type of instructions to my knowledge of this policy. It appears that someone around me had gotten knowledge of this policy and decided to make trouble for me instead of suggesting that I check with the audit department.

The member who made the complaint has been a member since September 1, 1981, has attended five regular meetings, and could not have known very much about Local affairs. When Brother McKinney came to audit the Local books, this member did not meet, see or communicate with the Auditor, but the Chairman of the Committee of Adjustment did meet with the Auditor before I met with him.

Brother Hardin, after you have had time to study the audit report and my request I hope you will feel led to help me recover all or part of the disallowed time.

Enclosed is my itemized list and explanation of the disallowed time by the Auditor.

With best wishes,

Fraternally yours,

/s/ G. P. Reed
G. P. Reed, Sec.-Treas.
Local 1715

Time Disallowed by Auditor

1. Check No. 1850—40 hours—$298.80

   Monday, January 7, 1980
   Tuesday, January 8, 1980
   Wednesday, January 9, 1980

   Monday, January 14, 1980
   Tuesday, January 15, 1980

   This time is two days above normal, but the Board of Trustees and the Local were satisfied that the days were applied to Local interest.

2. Check No. 1864—24 hours—$180.24

   Wednesday, February 13, 1980. I was off to complete a L-M2 amended report.

   February 20, 1980—February 21, 1980
   Sixteen hours working with H. L. Hunter, Field Supervisor.

3. Check No. 1918—8 hours—$62.48

   Thursday, September 11, 1980
   Working with H. L. Hunter

4. Check No. 1939—16 hours—$126.72

   Monday, September 29, 1980
   Tuesday, September 30, 1980
   Working with H. L. Hunter

5. Check No. 1987—8 hours—$64.32

   Wednesday, December 31, 1980

   This eight hours was getting election material together for run-off election between Ronald Hyde and Noel B. Shephard for Vice President.

6. Check No. 1998—24 hours—$192.92

   Tuesday, January 13, 1981
   Wednesday, January 14, 1981
   Wednesday, January 21, 1981

   These three days were making up annual, wage and tax reports for the year, and meeting with Board of Trustees in annual audit.

7. Check No. 2054—8 hours—$69.04

   Thursday, May 14, 1981

   Shopping for copy machine for Local use. Found what we could afford and purchased one later.

8. Check No. 2155—24 hours—$215.64

   Wednesday, January 13, 1982
   Thursday, January 14, 1982
   Friday, January 15, 1982

   Annual reports and meeting with Board of Trustees in annual audit. All concern were satisfied with the time and did approve it.

9. The time I have listed with Brother H. L. Hunter, Field Supervisor, can be verified by the insurance application dates.

/s/ G. P. Reed

October 1, 1982

Mr. Gordon P. Reed
LC, S&T—Local 1715
3349 Maywood Drive
Charlotte, NC 28205

Dear Sir and Brother:

This will acknowledge your letter of September 6, 1982 concerning time claims in your behalf for services performed on various dates during 1980 through January, 1982.

Obviously, your letter was prompted by actions that occurred during the recent audit of the accounts of Local 1715. I have thoroughly reviewed the report of the auditor and certainly subscribe to his observations concerning the method of disbursements against the driver's local committee, and particularly your claims which were rejected as attached to your letter.

The audit discloses that the driver's local committee is presently in deficit operation in the amount of $2,300.00. There is no provision in the Constitution that authorizes continuing deficit spending. Steps must be taken as not to incur any further expenses against the account. Hearings and investigations *do not require* the full committee to mark off from work to be present at hearings and investigations.

It is imperative that the local chairman and members of his committee take immediate steps to curtail the cost of representation to the extent that the expenses be kept below the income derived from local committee of adjustment dues and to keep the cost of operation at a low level so as to enable to use a portion of the committee's income to apply toward the present deficit.

It is important to impress upon all concerned that until such time as money accrues in the LCA Fund, no time, other than the General Chairman on urgent matters, should be lost in performing committee work. If a member requires representation, arrangements must be made, if possible, from among the members of the local committee by one who is off duty or on a layover. Any such arrangement *must be at the direction* of the local chairman.

Appropriate action of Local 1715 must be taken as soon as possible to increase the local committee assessments. This is a crucial matter since negotiations for a new labor agreement will begin in a few months. I should be advised of the action taken on this matter and amount of assessment.

The audit report also reveals that your monthly salary as secretary-treasurer is $250.00, yet, you have claimed on certain dates additional time for handling election material, preparing annual wage and tax reports, shopping for a copy machine, working with Field Supervisor Hunter, etc.

When a local officer is salaried, such compensation covers the responsibility of his office. When you were elected to your position, you assumed all responsibilities and duties of such office.

Under no circumstances can a claim be made against a local for "working with a Field Supervisor." This is not a liability of the local and any such future claims must be discontinued as well as those you outlined in the attachment to your letter.

Furthermore, I find that the local president, as well as yourself, have marked off your regular assignments to be in attendance at local meetings even though at times a quorum is not present to conduct a meeting. I am sure you realize that such an arrangement can become a financial burden upon the local. Unless specific approval has been granted by local action, this arrangement must be discontinued immediately. In the absence of a local president and secretary-treasurer at a meeting, temporary officers can be appointed to conduct the business of the local.

In conclusion, this letter is to alert all concerned that the matters outlined above are not consistent with our law and now must be corrected. For that reason, copies of this letter are being furnished to all concerned with the operation of the local.

Fraternally yours,

/s/ Fred A. Harding
President

cc: Mr. J. H. Shepherd, GS&T
Mr. K. R. Moore, VP, Dir., Bus Dept.
All Officers and Committee Members, L-1715

bc: Mr. Jim Swann
FAH:JFS:cg

July 18, 1983

Mr. Fred A. Harding
International President
United Transportation Union
14600 Detroit Avenue
Cleveland, Ohio 44107

Re: Local 1755, Transit
Management of Charlotte,
Inc. and G. P. Reed

Dear President Harding:

I have been retained by Mr. G. P. Reed to represent him on several matters involving the United Transportation Union.

The first issue concerns the fact that Mr. Reed has been subject to different standards with regard to his Union expenses than are applied to other members of the Union.

As you know, Mr. Reed was required to reimburse the Union for expenses which had been previously approved by the Local. Since that time, he has been required to pay other members of the Local for expenses which had not been previously approved.

Also, I am most concerned about the tone and content of the letter of June 28, 1983 to you from Mr. Kenneth R. Moore, Vice-President and Director of the Bus Department. Mr. Moore's letter in no way sets out an accurate description of the meeting which took place on June 25, 1983. Mr. Reed has asked Mr. Moore to have the meeting taped so that everyone would have a fair and accurate transcription of what took place. Mr. Moore not only refused, but also then filed a subjective and slanted report as to what took place. It is clear that his letter of June 28, 1983 is meant to impune Brother Reed and not to report the facts of what took place at the meeting.

It appears that the heart of this conflict involves Mr. A. Fred Warlick's actions to harass, intimidate and retaliate any member of the Local whom he feels does not support him as general chairman or in his efforts to seek other Union positions. As you know, any efforts by the International to support Mr. Warlick in these efforts may well constitute violations of 29 U.S.C. § 411.

Mr. Reed has long been an active and devoted Union member. I am surprised that the International has responded to his justifiable concerns in the manner that it has. I hope that we will be able to resolve this matter quickly to avoid further litigation.

Yours truly,
John Gresham

JG:rcl

July 22, 1983

Mr. John Gresham
Attorney at Law
Suite 730 East Independence Plaza
951 South Independence Blvd.
Charlotte, North Carolina 28202

Dear Mr. Gresham:

In reference to your letter of July 18, 1983, the fact is that Mr. Reed, in his position with Local 1715, was subject to an audit.

Upon such being carried out as provided by regulations, he was found to be liable for repayment of funds to the Local as required under the circumstances and the issue was considered closed upon repayment.

As to the letter of June 28 from Mr. K. R. Moore that you find of concern, it seems evident that Mr. Moore was present and knew what transpired. I see no intent whatsoever on the part of Mr. Moore to diminish the stature of Mr. Reed.

Yours truly,

/s/ Fred A. Hardin
F. A. Hardin
President

August 2, 1983

Mr. F. A. Hardin, President
United Transportation Union
14600 Detroit Avenue
Cleveland, Ohio 44107-4250

Re: Local 1715, United
Transportation Union

Dear President Hardin:

I have reviewed your letter of July 25, 1983.

As I set out to you in our earlier letter, it appears that the audit that was conducted was *not* in fact conducted pursuant to "regulations."

As to my comments concerning the letter of Mr. Moore, I was attempting to inform you of the fact that the other parties who were present did not feel that Mr. Moore had accurately represented what took place at the meeting.

I have advised Mr. Reed of your response concerning his request for reimbursement. I have also advised him of my recommendation to commence litigation on or about September 15, 1983, unless the Union has properly reviewed and reconciled this matter.

Yours truly,

/s/ John Gresham
John Gresham

JG:rcl

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
NORTH CAROLINA
CHARLOTTE DIVISION

CIVIL ACTION NO. C-C-85-477-P

(Caption omitted in printing)

AFFIDAVIT OF G. P. REED

G. P. Reed, being first duly sworn deposes and says:

1. I am a member in good standing of Local 1715 of the United Transportation Union.

2. In the fall of 1967 I was elected to the position of Treasurer/Secretary of Local 1715. I have held this position since that time having been last elected in the fall of 1984.

3. On a number of occasions I have opposed the actions of A. Fred Warlick, who for a number of years has been the General Chairman of Local 1715. Specifically:

a. In the fall of 1974 I ran against Warlick for the delegate to the National Convention of the Union and defeated him for the position. Warlick then refused to accept the position as alternate delegate.

b. In 1978-79 I served on the bargaining committee of Local 1715. During the bargaining I attempted to suggest to Warlick that he use a less hostile tone in the bargaining. Following the negotiations Warlick stated that "Reed is a company man" and that "all company people are bastards." He continued to make these comments through at least 1983.

c. In the spring of 1982 Warlick requested reimbursement for time spent in a grievance on January 8, 1982. After the reimbursement was made I learned that Warlick had also received pay from the company for a portion of the January 8, 1982 time

claimed on the reimbursement. When I questioned Warlick about this payment he became angry and refused to discuss the matter.

d. Throughout the spring and summer of 1982 I continued to make numerous requests of Warlick to make reimbursement to the Local for his time paid to him by the bus company on January 8, 1982. At the August 1982 meeting Warlick and others made claims for reimbursement of approximately $1,400.

e. At the time there were not sufficient funds in the treasury to pay all of the reimbursement requests. I so informed the members.

f. Warlick then stated that he did not want any funds if he could not get all that he had requested.

4. On August 25, 1982, I was informed that I would be audited by J. L. McKinney.

5. McKinney had been informed by Chief Auditor Swann prior to the audit that "I had a feud going with Warlick," that after "talking with Vice President Moore" Swann had instructed me "to pay lost time due General Chairman Warlick," and that "we have been told that Treasurer Reed is calling members telling them that no increase is needed and General Chairman Warlick is spending too much money. (See Exhibit A attached hereto which is provided by the defendants in response to a discovery request).

6. McKinney was asked to "take care of this assignment."

7. Upon his arrival in Charlotte Auditor McKinney was met at the airport by Warlick and escorted to the audit.

8. Although Auditor McKinney disallowed my reimbursement for reimbursement that had been approved

by Local 1715 on the basis that the approval was not obtained before the work was done, he could not provide me with any regulation which required such "prior approval."

9. During the audit, I raised with Auditor McKinney the fact that Warlick in January of the year had requested reimbursement for time for which he had received pay from the company. Auditor McKinney stated that he was not prepared to think about that matter at that time.

10. I paid the money, $1,210.20, and appealed to President Hardin from the decision of Auditor McKinney.

11. President Hardin denied the appeal. In his denial (Exhibit B) President Hardin also demanded that Local 1715 increase its local committee assessments.

12. In the fall of 1982 the Local President sought reimbursement for matters for which he had not gotten prior approval.

13. When I questioned these requests, President Hardin required that I pay them on the grounds that they were not "costly items."

14. On a number of occasions since the fall of 1982 I have been required to pay items for which there was no "prior approval." For example, on August 16 and 17, 1983, the Local President attended the Southern Christian Leadership Conference and requested reimbursement. No prior approval had been given for that expense. No explanation has been given for the failure to apply these "prior approval standards."

15. When I requested that the same standard be applied to me that is applied to others, President Hardin has refused to do so.

16. The actions taken by President Hardin and Vice President Moore have caused me not to speak out on a number of union issues for fear of further retaliatory treatment.

Further the deponent sayeth not.

This 14th day of January, 1986.

/s/ G. P. Reed
G. P. REED

EXHIBIT A

August 23, 1982

Mr. James L. McKinney
International Auditor
4341 Owens Road
Evans, GA 30809

Dear Sir and Brother:

I am sending you the audit file of Local 1715 along with the preliminary data and a commission in your favor prepared in the International Headquarters for taking up this audit as explained in the following paragraph:

> Local 1715, Charlotte, North Carolina, is at the request of Vice President K. R. Moore and member, Patrick O. Clark, 1818 Progress Lane, Charlotte, North Carolina 28205. (Please see his letter of August 14, 1982).

We have reason to believe that the General Chairman of the drivers, Brother Fred A. Warlicks and Secretary

and Treasurer G. Paul Reed have a feud going. Brother Reed permitted Warlicks' fund to become deficient without informing the committee of a needed assessment.

Brother Reed called the International stating local committee of adjustment for drivers was requesting the local funds be transferred to the grievance fund to pay lost time for Brother Warlicks. Not knowing the whole story, I told him he was correct not to transfer funds, I talked with Vice President Moore and called Local President and Treasurer Reed and told him to pay lost time due General Chairman Warlicks, but not expense, with a loan from the local dues and to increase local committee of adjustment assessment the next meeting.

We have been told that Treasurer Reed is calling members telling them that no increase is needed and General Chairman Warlicks is spending too much money.

We had Treasurer Reed into the International for training as auditor, but after arriving back home he resigned before his first assignment. We are also told that he will "mark off" his job and claim time as doing Treasurer's work. *No* lost time should be paid as he has an exorbitant salary anyway.

I am asking you to take care of this assignment just as soon as possible and if you have any questions pertaining to this assignment, kindly contact me at once.

Fraternally yours,
/s/ Jim Swann
Jim Swann
Chief Auditor

EXHIBIT B

October 1, 1982

Mr. Gordon P. Reed
LC, S&T - Local 1715
3349 Maywood Drive
Charlotte, NC 28205

Dear Sir and Brother:

This will acknowledge your letter of September 6, 1982 concerning time claims in your behalf for services performed on various dates during 1980 through January, 1982.

Obviously, your letter was prompted by actions that occurred during the recent audit of the accounts of Local 1715. I have thoroughly reviewed the report of the auditor and certainly subscribe to his observations concerning the method of disbursements against the driver's local committee, and particularly your claims which were rejected as attached to your letter.

The audit discloses that the driver's local committee is presently in deficit operation in the amount of $2,300.00. There is no provision in the Constitution that authorizes continuing deficit spending. Steps must be taken as not to incur any further expenses against the account. Hearings and investigations *do not require* the full committee to mark off from work to be present at hearings and investigations.

It is imperative that the local chairman and members of his committee take immediate steps to curtail the cost of representation to the extent that the expenses be kept below the income derived from local committee of adjust-

ment dues and to keep the cost of operation at a low level so as to enable to use a portion of the committee's income to apply toward the present deficit.

It is important to impress upon all concerned that until such time as money accrues in the LCA Fund, no time, other than the General Chairman on urgent matters, should be lost in performing committee work. If a member requires representation, arrangements must be made, if possible, from among the members of the local committee by one who is off duty or on a layover. Any such arrangement *must be at the direction* of the local chairman.

Appropriate action of Local 1715 must be taken as soon as possible to increase the local committee assessments. This is a crucial matter since negotiations for new labor agreement will begin in a few months. I should be advised of the action taken on this matter and amount of assessment.

The audit report also reveals that your monthly salary as secretary-treasurer is $250.00, yet, you have claimed on certain dates additional time for handling election material, preparing annual wage and tax reports, shopping for a copy machine, working with Field Supervisor Hunter, etc.

When a local officer is salaried, such compensation covers the responsibility of his office. When you were elected to your position, you assumed all responsibilities and duties of such office.

Under no circumstances can a claim be made against a local for "working with a Field Supervisor." This is not a liability of the local and any such future claims must

be discontinued as well as those you outlined in the attachment to your letter.

Furthermore, I find that the local president, as well as yourself, have marked off your regular assignments to be in attendance at local meetings even though at times a quorum is not present to conduct a meeting. I am sure you realize that such an arrangement can become a financial burden upon the local. Unless specific approval has been granted by local action, this arrangement must be discontinued immediately. In the absence of a local president and secretary-treasurer at a meeting, temporary officers can be appointed to conduct the business of the local.

In conclusion, this letter is to alert all concerned that the matters outlined above are not consistent with our law and now must be corrected. For that reason, copies of this letter are being furnished to all concerned with the operation of the local.

Fraternally yours,
/s/ Fred A. Hardin
President

cc: Mr. J. H. Shepherd, GS&T
Mr. K. R. Moore, VP, Dir., Bus Dept.
All Officers and Committee Members, L-1715

bc: Mr. Jim Swann

FAH:JFS:cg

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
NORTH CAROLINA
CHARLOTTE DIVISION

CIVIL ACTION NO. C-C-85-477-P

(Caption omitted in printing)

AFFIDAVIT OF COLLIE BOYD, JR.

Collie Boyd, Jr., being first duly sworn, deposes and says:

1. In the summer of 1982 I had declared myself as a candidate to be Local 1715's delegate to the Union's National Convention.

2. Fred Warlick also sought the position as delegate to the Convention.

3. During the audit of G. P. Reed in August, 1982, Telphia Beatty, then Vice Chairman of Local 1715, said to me while we were riding to the motel where the audit was being held that "they had me and Paul Gillard for claiming time lost, but they probably weren't going to bother Paul Gillard and I since they were after G. P. Reed."

4. Beatty also said that I should withdraw from the race for national delegate and let Fred have it.

5. I told Beatty that I did not think I had done anything wrong and that I would not be pressured by him and Fred into withdrawing.

Further the deponent sayeth not.

This 13th day of January, 1986.

/s/ Collie Boyd, Jr.
Collie Boyd, Jr.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
NORTH CAROLINA
CHARLOTTE DIVISION

CIVIL ACTION NO. C-C-85-477-P

(Caption omitted in printing)

AFFIDAVIT OF JAMES SWANN

I, James Swann, pursuant to 28 U.S.C. 1746, and under penalty of perjury, do state the following facts to be true and correct.

1. In my letter dated August 23, 1982, which was attached as Exhibit A. to the affidavit of G. P. Reed, I was attempting to direct Auditor McKinney to perform the audit of G. P. Reed. In that letter I told him the letter of Patrick Clark triggered the audit. I also tried to make him aware of the situation in the local as I knew it.

2. Mr. Reed's statement in paragraph 6 of his affidavit that McKinney was asked to "take care of this assignment" appears to imply something other than my intent. In fact, that phrase is used by me as a matter of form in making audit assignments as is clear by the assignment I gave G. P. Reed himself after he had qualified as an International Auditor by letter dated October 19, 1979, which I attach a copy of to this affidavit. Mr. Reed at that time did not complete that assignment which I then gave to another auditor.

EXECUTED ON Jan. 29, 1986.

/s/ James Swann
James Swann

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
NORTH CAROLINA
CHARLOTTE DIVISION

CIVIL ACTION NO. C-C-85-477-P

(Caption omitted in printing)

AFFIDAVIT OF A. FRED WARLICK

I, A. Fred Warlick, pursuant to 28 U.S.C. 1746, and under penalty of perjury, do state the following facts to be true and correct.

1. Contrary to the statements made in the affidavit of G. P. Reed when I did not succeed in being elected a Delegate to the UTU Convention in the Fall of 1974, I simply decided not to run for Alternate Delegate. My decision had nothing to do with Mr. Reed's election.

2. In 1978-79 while Mr. Reed and I were on the bargaining committee of Local 1715, I never made statements following the negotiations that "Reed is a company man" or that "all company people are bastards." I do not remember any hostility between Mr. Reed and I. We simply disagreed over some contract proposals.

3. I requested reimbursement for time spent in a grievance on January 8, 1982, on which day I worked 2 hours for the company, and then at the company's request I clocked out to represent a driver member who would not talk without union representation. I spent from 8:30 a.m. until 9:00 p.m. on this matter, and it was brought up to the membership three times, and all three times they voted to pay it.

4.. In about August of 1982 I made a request for reimbursement of about $900.00 as I recollect, although it could have been for more. At the time I did not know about the status of assessments or that they were separated as between drivers and garage people. My recollection was that the members approved the payment while I was handling these labor board matters with one of our retained lawyers. Eventually, President Hardin ordered that the payment be made to me.

EXECUTED ON 1/30/86.

/s/ .....
A. Fred Warlick

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
NORTH CAROLINA
CHARLOTTE DIVISION

CIVIL ACTION NO. C-C-85-477-P

(Caption omitted in printing)

AFFIDAVIT OF TELPHIA BEATTY

I, Telphia Beatty, pursuant to 28 U.S.C. 1746, and under penalty of perjury, do state the following facts to be true and correct.

1. Contrary to the statement in the affidavit of Collie Boyd, Jr., I never told Mr. Boyd that "they (the auditor) had me and Paul Gillard for claiming time lost, but they probably weren't going to bother Paul Gillard and I since they were after G. P. Reed." I rode to the motel where the auditor was staying in my pickup truck with Mr. Boyd and A. Fred Warlick. Nobody made any statements like Mr. Boyd's statement and there was no discussion along those lines.

2. In about January of 1983 after Mr. Boyd's second election as Delegate to the UTU Convention, he asked me to help him get money to attend the Convention. When I told him I could not help him, he asked me if A. Fred Warlick would want to go to the Convention in his place. I told him that Fred could not go because he was not the Alternate Delegate.

3. Mr. Boyd never told me that he had not done anything wrong and that he would not be pressured by me and

Fred into withdrawing as Delegate because I never pressured him in any way.

EXECUTED ON 1/30/86

/s/ .....
Telphia Beatty

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA CHARLOTTE DIVISION

C-C-85-477-P

(Caption omitted in printing)

ORDER

(Filed May 1, 1986)

THIS MATTER was heard before the undersigned on January 31, 1986 in Charlotte, North Carolina on the Defendants' Motion to dismiss or for summary judgment. The Defendants were represented by Clinton J. Miller and J. David Jones, Attorneys at Law. The Plaintiff was represented by John W. Gresham, Attorney at Law.

The Plaintiff, G. P. Reed, is the Secretary/Treasurer of Local 1715 of the Defendant United Transportation Union, which is a labor organization within the meaning of 29 U.S.C. § 401 *et seq.* In August, 1982, Defendant Fred A. Hardin, President of the Union, sent Defendant J. L. McKinney, International Auditor of the Union, to Charlotte, North Carolina to audit the books and records of Local 1715. The audit was prompted by a letter to Defendant Hardin from a member of Local 1715 regarding his concerns about the financial stability and future of the Local. As a result of the audit, Defendant McKinney disallowed checks paid by the Local to the Plaintiff for "time lost" in the amount of $1,210.20.

The Plaintiff paid the amount disallowed, but appealed Defendant McKinney's findings to Defendant Hardin by way of a letter dated September 6, 1982. The

Plaintiff claimed that the repayment of the $1,210.20 was demanded on the ground that he was required to get approval for reimbursement for "time lost" to do various tasks *before* "losing" the time and doing the work. He further claimed that no such prior approval requirement had existed or been enforced before its application to him.

Defendant Hardin denied the Plaintiff's appeal in a letter dated October 1, 1982. Hardin explained that when a local officer is salaried, his regular salary is meant to cover the responsibilities of his office. He noted that the payments that were disallowed had been claimed for the performance of ordinary duties and responsibilities of his office.

The Plaintiff subsequently sought to enforce the "prior approval" policy he claims had been applied to him when Local President Fred Warlick and another Local officer requested reimbursement for time spent on Local 1715 business for which the Local had not given prior approval. Defendant Hardin, however, ordered the Plaintiff to pay those claims.

On June 28, 1983, the Plaintiff met with Defendant K. R. Moore, Vice President of the Union, to determine whether the Union planned to continue to enforce dual policies with respect to expense payments by denying his appeal for reimbursement. The Plaintiff claims that Defendant Moore refused to discuss the matter.

On July 1, 1983, the Plaintiff's attorney wrote to Defendant Hardin complaining about the $1,210.20 repayment the Plaintiff was required to make to the Union after the audit as a result of the different standards allegedly

applied to the Plaintiff and other Union members with regard to payment of Union expenses. He asserted that the heart of the conflict involved Local President Warlick's actions to harass the Plaintiff for not supporting his views, and that if the Union supported Warlick in those efforts, it would be in violation of 29 U.S.C. § 411.

On July 22, 1983, Defendant Hardin responded to the Plaintiff's attorney, stating that the issue concerning the time disallowed as a result of the audit had been considered closed once the Plaintiff had made his repayment to the Union.

On August 2, 1983, the Plaintiff's attorney sent Defendant Hardin another letter, in which he reported that he had advised the Plaintiff of Hardin's response concerning his request for reimbursement. He also informed Defendant Hardin that he had advised the Plaintiff "to commence litigation on or about September 15, 1983, unless the Union has properly reviewed and reconciled this matter." Letter dated August 2, 1983 from John Gresham, Esq. to Union President Hardin.

The Plaintiff filed this action on August 2, 1985, exactly two years after his attorney's last letter to Defendant Hardin. In his Complaint, the Plaintiff raises claims under the Labor-Management Reporting and Disclosure Act, 29 U.S.C. § 401 *et seq.* ("LMRDA") as well as pendent state implied contract and quantum meruit claims. Specifically, the Plaintiff claims that the Defendants have violated the Plaintiff's rights to freedom of speech and assembly as a union member as well as his right to be safeguarded from improper disciplinary action under Title

I of the LMRDA, 29 U.S.C. § 411.[1] He claims that the selective application of the "prior approval" policy to disallow his claims was meant to punish him for speaking out against Local President Warlick, whose claims for reimbursement were not denied despite his failure to obtain prior approval for his "time lost." He also claims that the Defendants have not properly exercised their fiduciary duties as officers of the Union pursuant to Title V of the LMRDA, 29 U.S.C. § 501.[2]

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1 The relevant text of § 411 provides:

> (2) Freedom of speech and assembly. Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: Provided, That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations.
>
> (5) Safeguards against improper disciplinary action. No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined except for nonpayment of dues by such organization or by any officer thereof unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing.

29 U.S.C. § 411(a)(2), (a)(5).

2 The relevant text of § 501 provides:

> (a) Duties of officers; exculpatory provisions and resolutions void. The officers, agents, shop stewards, and

(Continued on following page)

Whether the Court may entertain the Plaintiff's claim under § 411 of Title I of the LMRDA depends on whether that claim has been brought in a timely fashion. Because Congress has not explicitly provided a limitations period for such claims, the Court must "borrow" the most appropriate statute of limitations from some other source.

The last Fourth Circuit case to address the issue of what statute of limitations to apply to a claim under § 411 of the LMRDA was *Howard v. Aluminum Workers International Union*, 589 F.2d 771 (4th Cir. 1978). In *Howard*, the Fourth Circuit noted that courts "have found that denial of free speech is similar to a personal injury under state law and have applied tort limitations statutes to such claims." *Id.* at 774. Accordingly, the Court determined that Virginia's two-year statute of limitations for per-

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(Continued from previous page)

> other representatives of a labor organization occupy positions of trust in relation to such organization and its members as a group. It is, therefore, the duty of each such person, taking into account the special problems and functions of a labor organization, to hold its money and property solely for the benefit of the organization and its members and to manage, invest, and expend the same in accordance with its constitution and bylaws and any resolutions of the governing bodies adopted thereunder, to refrain from dealing with such organization as an adverse party or in behalf of an adverse party in any matter connected with his duties and from holding or acquiring any pecuniary or personal interest which conflicts with the interests of such organization, and to account to the organization for any profit received by him in whatever capacity in connection with transactions conducted by him or under his direction on behalf of the organization.
>
> 29 U.S.C. § 501(a).

sonal injury claims should apply to the Plaintiff's claim that his union had abridged his right of free speech guaranteed by Title I of the LMRDA.

Since *Howard* represents the Fourth Circuit's last word on the appropriate limitations period for actions bought under Title I of the LMRDA, the Plaintiff contends that this Court is bound to apply North Carolina's three-year statute of limitations for personal injury actions. The Defendant, on the other hand, relies on the Supreme Court's more recent opinion in *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983), and its progeny and argues that the Court should apply the six-month limitations period of Section 10(b) of the National Labor Relations Act for unfair labor practices charges to the Plaintiff's LMRDA Title I claim.

The task before the Court in *DelCostello* was the selection of an appropriate statute of limitations for a "hybrid" action combining (1) a union member's claim against his employer under § 301 of the Labor Management Relations Act for violation of a collective bargaining agreement, and (2) his claim against his union for breach of its implied duty of fair representation in its handling of his grievance against the employer. The Court stated at the outset of its opinion that it has "generally concluded that Congress intended that the courts apply the most closely analagous statute of limitations under state law" when federal law fails to provide explicitly for a limitations period for a federal action. *Id.* at 158. The Court noted, however, that "[i]n some circumstances, . . . state statutes of limitations can be unsatisfactory vehicles for the enforcement of federal law. In those in-

stances, it may be inappropriate to conclude that Congress would choose to adopt state rules at odds with the purpose or operation of federal substantive law." *Id.* at 172.

The Court proceeded to reject the state statutes of limitations suggested by the parties because they provided imprecise analogies to the claims in the hybrid action and failed to accommodate the policy considerations underlying the hybrid action. The Court found the usual ninety-day statute of limitations for the vacation of arbitration awards to be too short to provide an employee with a "satisfactory opportunity to vindicate his rights under § 301 and the fair representation doctrine." *Id.* at 166. On the other hand, the Court determined malpractice limitations periods, varying from three years to ten years, to be too long in light of the strong federal interest in speedy resolution of suits involving the grievance and arbitration procedures of a collective bargaining agreement. *Id.* at 168-69. The Court adopted instead the six-month limitations period of § 10(b) of the National Labor Relations Act, "a federal statute of limitations actually designed to accommodate a balance of interests very similar to those at stake here—a statute that is, in fact, an analogy to the present lawsuit more apt than any of the suggested state-law parallels." *Id.* at 169.

In deciding to apply § 10(b)'s six-month period to the hybrid action, the Court first noted that a "substantial overlap" often exists between claims against a union for breach of its duty of fair representation, against an employer for breach of a collective bargaining agreement, and unfair labor practice charges. It found that "fair representation claims are allegations of unfair, arbitrary, or

discriminatory treatment of workers by unions—as are virtually all unfair labor practice charges made by workers against unions." *Id.* at 170. It further stated that "it may be the case that alleged violations by an employer of a collective bargaining agreement will also amount to unfair labor practices." *Id.*

Even more important to the Court in its decision to adopt § 10(b)'s limitations period was the close similarity of the policy considerations relevant to the choice of a limitations period for unfair labor practice charges and for hybrid § 301/fair representation actions. The Court observed:

> "In § 10(b) of the NLRA, Congress established a limitations period attuned to what it viewed as the proper balance between the national interests in stable bargaining relationships and finality of private settlements, and an employee's interest in setting aside what he views as an unjust settlement under the collective-bargaining system. That is precisely the balance at issue in this case. The employee's interest in setting aside the 'final and binding' determination of a grievance through the method established by the collective-bargaining agreement unquestionably implicates 'those consensual processes that federal labor law is chiefly designed to promote—the formation of the . . . . agreement and the private settlement of disputes under it.' *Hoosier*, 383 U.S. at 702. Accordingly, 'the need for uniformity' among procedures followed for similar claims, *ibid.*, as well as the clear congressional indication of the proper balance between the interests at stake, counsels the adaptation of § 10(b) of the NLRA as the appropriate limitations period for [hybrid § 301/fair representation lawsuits]."

Id. at 171 (quoting *United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56, 70-71 (1981) (Stewart, J., concurring)).

The Supreme Court did not, however, intend to create an all-embracing new rule to be applied whenever an action involving a labor dispute lacks a congressionally enacted statute of limitations. The Court stressed that

> our holding today should not be taken as a departure from prior practice in borrowing limitations periods for federal causes of action, in labor law or elsewhere. We do not mean to suggest that federal courts should eschew use of state limitations periods anytime state law fails to provide a perfect analogy. *See, e.g., Mitchell,* 451 U.S., at 61, n. 3. On the contrary, as the courts have often discovered, there is not always an obvious state-law choice for application to a given federal cause of action; yet resort to state law remains the norm for borrowing of limitations periods.

DelCostello, 462 U.S. at 171.

Consistent with this cautionary language, the Supreme Court in *DelCostello* did not disturb its holding in *Auto Workers v. Hoosier Cardinal Corp.,* 383 U.S. 696 (1966), that the six-year state statute of limitations governing contracts should be applied to an action under a collective bargaining agreement brought by a union against an employer. The Court noted that in *Hoosier* it had resisted the suggestion to establish a uniform federal period of limitations for such lawsuits despite its recognition that suits involving labor-management relations ordinarily call for uniform law. The *DelCostello* Court explained its decision in *Hoosier* by stating:

> [W]e reasoned that national uniformity is of less importance when the case does not involve "those consensual processes that federal labor law is chiefly designed to promote—the formation of the collective agreement and the private settlement of disputes under it," 383 U.S., at 702. We also relied heavily on the obvious and close analogy between this variety of § 301 suit and an ordinary breach-of-contract case.

DelCostello, 462 U.S. at 163.

Since *DelCostello,* the circuits have split on the issue whether § 10(b)'s six-month limitations period should be extended to a union member's LMRDA Title I claims against his union. The Sixth and Seventh Circuits have determined in a conclusory fashion that the factors guiding the Supreme Court's choice of a limitations period for the hybrid action in *DelCostello* apply with equal force in the context of an LMRDA claim and, therefore, subjected the LMRDA claims before them to the same six-month limit. *See Adkins v. Electrical Workers,* 769 F.2d 330, 335 (6th Cir. 1985); *Vallone v. Local Union No. 705, International Brotherhood of Teamsters,* 755 F.2d 520, 521-22 (7th Cir. 1984).

The Third Circuit reached the same conclusion after a more detailed analysis in *Local Union 1397 v. United Steelworkers,* 748 F.2d 180 (3rd Cir. 1984). Following the analysis used in *DelCostello,* the Court first found that Title I of the LMRDA and the NLRA provisions governing unfair labor practices bear a "family resemblance" since they "are both addressed to the same basic concern: the protection of individual workers from arbitrary actions by unions . . . ." *Id.* at 183.

It was the perceived similarity in policy considerations underlying the choice of a limitations period for LMRDA claims and unfair labor practice charges, however, that convinced the Third Circuit to apply § 10(b)'s six-month period. The Court found that, while a union

member needs sufficient time to vindicate his rights under the LMRDA, "rapid resolution of internal union disputes is necessary to maintain the federal goal of stable bargaining relationships, for dissension within a union naturally affects that union's activities and effectiveness in the collective bargaining arena." *Id.* at 184.

As a final point, the Third Circuit expressed its opinion that a six-month limitations period for LMRDA claims would not be inherently unfair to union members. It noted that LMRDA Title I violations are rarely latent, and thus the aggrieved union member should be able to decide whether to sue within six months of the time the cause of action arises. The Court believed in essence that if the Supreme Court thought six months was enough time for filing a § 301 claim, the imposition of a six-month limit for filing an LMRDA claim would likewise be fair. *Id.*

Although ultimately adopting the result reached by the Third Circuit in *Local Union 1397*, the Eleventh Circuit in *Davis v. United Automobile Aerospace, and Agriculture Implement Workers*, 765 F.2d 1510 (11th Cir. 1985), *cert. denied*, — U.S. — (1986), revealed certain weaknesses in the Third Circuit's reasoning. With regard to the adequacy of a six-month period for filing an LMRDA Title I claim, the Eleventh Circuit noted a potential practical problem that could preclude the aggrieved union member from perfecting his LMRDA claim. The Court explained:

> A cause of action under section 411 accrues when the plaintiff union member discovers, or in the exercise of reasonable diligence should have discovered, the act constituting the alleged violations, at which time the statute of limitations begins to run. However, section 411(a)(4) provides that a union member may be required to exhaust reasonable internal union procedures for up to four months before proceeding with a suit under section 412. Thus, union members might be forced into a "Catch-22" situation in which they could be barred from suing the union if they wait to sue for more than six months while exhausting union remedies, but could be dismissed from federal court for failure to exhaust internal remedies if they file suit within the limitations period without seeking to exhaust.

Id. at 1515 n.13.

More significant to the issue whether the reasoning of *DelCostello* compels application of § 10(b)'s limitations period to LMRDA Title I claims is the Court's rejection of the Third Circuit's conclusion that rapid resolution of a union member's LMRDA grievance against his union is necessary to maintain the federal goal of stable bargaining relationships. The Court found that the link between dissension within a union and the union's effectiveness in the collective bargaining arena "appears rather tenuous in the situation of a single dispute between an individual union member and the union." *Id.* at 1514 n.11. Indeed, the Court flatly disagreed with the Third Circuit's appraisal that the same policy considerations underlying the choice of a statute of limitations for unfair labor practices are present in an LMRDA Title I suit. The Court stated:

> [W]e note an important distinction between the present action and a hybrid § 301/fair representation claim as was alleged in *Del Costello*.
>
> . . . .

> The present action, alleging a violation of statutorily-protected free speech, involves a different balance of interests [than did the hybrid action in *DelCostello*]. First, an action alleging a violation of 29 U.S.C. § 411 is brought only against the union; the employer is not involved. Therefore, the national interests in stable labor-management bargaining relationships and the speedy, final resolution of disputes under a collective bargaining agreement are not implicated. Accordingly, the need for national uniformity in the application of limitation periods to such an action is not as great. *See DelCostello*, 108 S.Ct. 15 2289; *Auto Workers v. Hoosier Corp.*, 383 U.S. 696, 702, 86 S.Ct. 1107, 1111, 16 L.Ed.2d 192 (1966). Furthermore, a union member's interest in protection against the infringement of his rights of free speech rises to a national interest, as embodied in section 101(a)(2) of the LMRDA, 29 U.S.C. § 411(a)(2), and thus seems of greater importance than an employee's interest in setting aside an individual settlement under a collective bargaining agreement.

Id. at 1514 (footnote omitted).

Despite its recognition of these policy arguments against extending § 10(b)'s six-month limitations period to LMRDA Title I claims, the Eleventh Circuit felt "constrained by the rationale of *DelCostello* and the holdings of our sister circuits to reach the same conclusion in the present case." *Id.* The Court stated that it felt bound by the fact that the Supreme Court had found a strong connection between the national interest in labor peace and the necessity for a short time period in which to bring an action based on a labor union's implied duty of fair representation to find a similar connection between labor peace and an action based on a union's alleged mistreatment of its members under Title I of the LMRDA. *Id.*

It is true that the Supreme Court in *DelCostello* identified the federal policy in favor of "relatively rapid final resolution of labor disputes" as a reason for rejecting the suggested three- to nine-year malpractice statute of limitations for the fair representation claim against the union. *DelCostello*, 462 U.S. at 168. This Court notes, however, that what the Supreme Court may consider "relatively rapid" in one type of labor dispute may be different from what may satisfy that policy in another context. In *DelCostello*, the Court mentioned the "rapid resolution" policy in the context of its discussion of the need for speedy and final resolution of disputes that may involve the interpretation of critical terms in the collective bargaining agreement affecting the entire relationship between company and union. *Id.* at 169. In *Auto Worker v. Hoosier*, *supra*, however, the Court specifically found that the federal goal of "relatively rapid disposition of labor disputes" suggested by § 10(b)'s six month provision would be satisfied by application of a *six-year* statute of limitations in the context of a § 301 action by a union against an employer for a straightforward breach of a collective bargaining agreement. *Hoosier*, 383 U.S. at 707. In any event, this Court does not agree with the Eleventh Circuit's sudden conclusion that the Supreme Court's concern over the speedy resolution of the fair representation claim in *DelCostello* automatically mandates as speedy a resolution when the suit is based on a dispute under Title I of the LMRDA.

The First Circuit recently issued a thorough and well reasoned opinion in *Doty v. Sewall* 784 F.2d 1 (1st Cir. 1986), in which it refused to follow its sister circuits in their extension of the result in *DelCostello* to actions

brought solely against a union for a violation of Title I of the LMRDA. After examining the reasoning and cautionary language of *DelCostello* the Court "dr[e]w the clear conclusion that *DelCostello* is not the kind of precedent that lends itself as a springboard for easy application to other rights, statutes and policies. Rather, it is a closely reasoned exception to a general rule which illumines a rather narrow path." *Id.* at 6. It further stated that its

> own scrutiny of the interests and policies at stake in this [LMRDA Title I] case convinces us that they so differ from those in *DelCostello* that its underlying approach mandates adherence in this case to the normal mode of applying "the most closely analogous statute of limitations under state law." 462 U.S. at 158.

Id. at 2.

Specifically the First Circuit found from the legislative history of the LMRDA that Title I, which was designated a "bill of rights" akin to that in our federal constitution, was enacted to protect a union member's civil and political rights as opposed to his economic rights. Thus, whereas the labor-management relationship is the core of the NLRA and the hybrid § 301/fair representation claim, the individual's interest in internal union democracy is at the heart of Title I of the LMRDA. The Court drew from the legislative history "the sense that claims under Title I's bill of rights provisions were viewed primarily as civil rights matters rather than as labor matters." *Id.* at 8. It, therefore, believed that deriving a statute of limitations for pure Title I LMRDA claims from a state statute governing civil rights actions would be more logical than borrowing one from an unfair labor practices statute.

Accord McQueen v. MaGuire, No. 82 Civ. 8445 (PNL), Slip Op. (S.D.N.Y. March 11, 1986); *Bernard v. Delivery Drivers* 587 F. Supp. 524 (D. Colo. 1984).

Like the Eleventh Circuit, the First Circuit also determined that an LMRDA bill of rights claim does not implicate the same underlying policy concerns found in *DelCostello.* Such a claim cannot be asserted against an employer; does not challenge the stable bargaining relationship between the union and the employer; and does not affect the interpretation of a collective bargaining agreement. In addition, when a union member is suing only for breach of his "civil rights" under Title I of the LMRDA, there is no attack on a private settlement under a collective bargaining agreement. The Court thus concluded that "the interests served by a rather short statute of limitations in *DelCostello,* stable labor-management relationships and finality in privately grieved and arbitrated settlements, are virtually, if not entirely, absent in the case at bar." *Id.* at 7.

In contrast, the Court found that the interest of the union member is "qualitatively enhanced" in an LMRDA Title I case. The rights asserted in a Title I case were created by Congress in a specific statute modeled after the federal Bill of Rights. *Id.* at 7; *see also United Steelworkers v. Sadlowski,* 457 U.S. 102, 108-111 (1982). Thus, the union member's interest represents a national policy. The Court noted that there are no such specifically identified rights in a hybrid claim. Furthermore, the Court found that the objective of Title I is to increase union democracy, whereas the objective sought in the typical hybrid case is a purely personal victory in the form of

restoration of job, pay, or promotion." *Id.* at 9. The Court concluded that the "sorts of interests protected by the LMRDA make it inappropriate to limit suits under that act without a compelling reason." *Id.* at 9. *Accord McQueen v. Maguire,* No. 82 Civ. 8445 (PNL) Slip Op. (S.D.N.Y. March 11, 1986) ("a very short limitations period [for LMRDA bill of rights claims] would be justified only in the face of an overwhelming national interest in speedy resolution of the suit"): *Rodonich v. House Wreckers Union Local 95,* 624 F. Supp. 678, 682 (S.D.N.Y. 1985) ("Although the rapid resolution of labor disputes serves an important national policy, its urgency is not so great when the result of applying the six-month statute might be to thwart the Congressional purpose in enacting the LMRDA, which was to provide union members with a 'bill of rights.'"): *Rector v. Local Union No. 10,* Civil No. 4-85-1142, Slip Op. at 11, 12 (D. Md. October 31, 1985) ("The importance of [a union member's "bill of rights"] in our legal system should lead us to give union members every opportunity to vindicate those rights, instead of searching out a short period of limitations . . . . Federal labor law should not be procedurally determined to resolve LMRDA claims quickly in a vain attempt to protect unions from diversity. Congress had precisely the opposite intent in mind when it wrote the LMRDA.")

The Second Circuit's interpretation of the reach of *DelCostello* also advises against adopting § 10(b)'s six-month limitations period for LMRDA Title I claims. While arguing that *DelCostello* need not be narrowly construed to apply only to claims identical to those in *Del Costello,* the Second Circuit in *Robinson v. Pan American World Airways, Inc.,* 777 F.2d 84 (2d Cir. 1985), adhered

to its earlier view expressed in *Monarch Long Beach Corp. v. Soft Drink Workers Local 812,* 762 F.2d 228 (2d Cir. 1985), *cert. denied,* — U.S. —, 106 S.Ct. 569 (1986), that *DelCostello* is inapplicable to actions which do not involve an immediate and direct impact on labor-management relations. It stated that in determining whether *DelCostello* should be applied in a labor-related matter, "the key question is whether the dispute arises out of a labor-management relationship in which uniform and speedy settlement is highly desireable." *Id.* at 89.

Obviously, a union member's LMRDA Title I claim does not arise out of a labor-management relationship, but rather out of the union member's relationship with his union. It impacts only tangentially, if at all, on the union's bargaining relationship with the employer. Further, the Supreme Court noted in *DelCostello* that national uniformity is of less importance when the case does not involve "'those consensual processes that federal labor law is chiefly designed to promote—the formation of the collective bargaining agreement and the private settlement of disputes under it.'" *DelCostello, supra,* 462 U.S. at 162-163 (quoting *Hoosier,* 383 U.S. at 702). A Title I LMRDA suit such as the one presently before this Court does not implicate "those consensual processes," so application of a uniform federal limitations period is not as crucial a concern as it was in *DelCostello.*

The Court further believes that the Eleventh and First Circuits have aptly demonstrated that LMRDA Title I actions do not involve the same policy considerations that compelled the Court to adopt a rather short limitations period in *DelCostello.* Finally, the Court agrees

with the First Circuit that an LMRDA Title I claim more closely resembles a civil rights claim than an unfair labor practice charge and that it is, therefore, more appropriate to borrow a statute of limitations applicable to a civil rights action than one that governs unfair labor practice charges.

Thus, having reviewed the precedents from other circuits on the propriety of extending *DelCostello* to actions based on a union member's LMRDA Title I claim against his union, the Court is of the opinion that the sounder position is to decline to apply § 10(b)'s six-month limitations period to the Plaintiff's LMRDA Title I claim. Instead, the Court will apply North Carolina's three-year limitations period for personal injury actions under N.C. Gen. Stat. § 1-52 since that statute would apply to a federal civil rights action. *See Wilson v. Garcia*, — U.S. —, 105 S.Ct. 1938 (1985) (state statutes of limitations for personal injury actions should apply to federal civil rights actions). This result is in accord with the Fourth Circuit's pre-*DelCostello* disposition of the LMRDA statute of limitations problem in *Howard v. Aluminum Workers International Union and Local*, 589 F.2d 771, 774 (4th Cir. 1978). Thus, the Plaintiff's LMRDA Title I claim should not be dismissed as untimely, since he filed it within three years of the time the cause of action arose.

Because the circuits are divided on this statute of limitations issue, however ,the Court recognizes that there is substantial ground for difference of opinion with its ruling on the timeliness of the Plaintiff's LMRDA Title I claim. Since the resolution of the limitations issue involves a controlling question of law which cou'd dispose

of the Plaintiff's LMRDA Title I claim, an immediate appeal may materially advance the ultimate termination of the litigation of that claim. Therefore, the Defendants are entitled to apply to the Fourth Circuit Court of Appeals for an interlocutory appeal of this ruling within ten days of the entry of this Order pursuant to 28 U.S.C. § 1292(b).

Since the Court has determined that the Plaintiff's LMRDA Title I claim should not be dismissed as untimely, it must consider the Defendants' alternative argument that the claim should be dismissed because the Plaintiff failed to exhaust his internal union remedies pursuant to 29 U.S.C. § 411(a)(4).[3] The Defendants argue that President Hardin's unfavorable response to the Plaintiff's request for reimbursement could have been appealed to the Board of Directors of the Union pursuant to Article 75, II of the Union Constitution if the Plaintiff had not procrastinated in asserting his claims. That article of the Union Constitution provides:

> A member or subordinate body may appeal to the Board of Directors from an interpretation of this Constitution made by the International President, provided such appeal is filed with the General Secretary and Treasurer within ninety (90) days from the date the decision by the International President was made.

UTU Constitution, Article 75, II.

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[3] 29 U.S.C. § 411(a)(4) provides:

> No labor organization shall limit the right of any member thereof to institute an action in any court . . . . Provided, that any such member be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) within such organization, before instituting legal . . . proceedings against such organizations or any officer thereof . . . .

The Plaintiff contends that Article 75, II does not apply in this case since it covers only appeals from the President's interpretation of the Union's Constitution. The Plaintiff has never sought an interpretation of the Constitution from President Hardin. Since the claim involves matters of internal regulation and not matters of constitutional interpretation, the Court finds that the Plaintiff did not have a right to appeal President Hardin's decision under the provision cited by the Defendants. As the Defendants have shown the Court no other internal remedies that were available to the Plaintiff, there appears to be no valid basis for their argument for dismissal because of failure to exhaust union remedies.

The Defendants also seek dismissal of the Plaintiff's claim under Title V of the LMRDA, 29 U.S.C. § 501, for failure to state a claim upon which relief may be granted. The Defendant contends that the Plaintiff cannot allege or prove that they did anything other than hold the Union's money and property solely for the benefit of the organization as required by § 501(a) in making the Plaintiff reimburse the Local's treasury $1,210.20, the amount disallowed as a result of the audit. Indeed, the Defendants contend that they might have been dangerously close to failing to comply fully with the spirit of § 501(a) had they not required such reimbursement after the membership complaint and audit.

The Court notes initially that the Plaintiff's Complaint does not state a claim under § 501 against the Defendant Union. That section provides for an action to be taken against an "officer, agent, shop steward, or representative of any labor organization." 29 U.S.C. § 501(b).

It does not provide for suit against the labor organization itself. *Stelling v. International Brotherhood of Electrical Workers*, 587 F.2d 1379, 1386 n.6 (9th Cir. 1978); *Pignotti v. Local # 3, Sheet Workers' International Association*, 477 F.2d 825, 832 (8th Cir.), *cert. denied*, 414 U.S. 1067 (1973).

While § 501(a) provides the substantive basis for a claim based on a union officer's breach of his fiduciary duties, § 501(b) sets forth the procedural requirements that must be met before a union member may maintain an action for a violation of § 501(a). Specifically, § 501(b) provides:

> When any officer, agent, shop steward or representative of any labor organization is alleged to have violated the duties declared in subsection (a) of this section and the labor organization or its governing board or officers refuse or fail to sue or[4] recover damages or secure an accounting or other appropriate relief within a reasonable time after being requested to do so by any member of the labor organization, such member may sue such officer, agent, shop steward, or representative in any district court of the United States . . . to recover damages or secure an accounting or other appropriate relief for the benefit of the labor organization. No such proceeding shall be brought except upon leave of court obtained upon verified application and for good cause shown, which application may be made ex parte.

29 U.S.C. § 501(b). Thus, the Plaintiff must meet two statutory condition precedents before he may maintain

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[4] The "or" has been consistently construed to mean "to." *Dinko v. Wall*, 531 F.2d 68, 72 n.4 (2d Cir. 1976).

his action against the Defendants: (1) the Plaintiff must have unsuccessfully demanded that the union or its governing board or officers bring the action; and (2) the Plaintiff must secure court permission to bring the action by filing a verified application with the court showing good cause. Further, the Plaintiff must be seeking relief on behalf of the union rather than on his own behalf. Because § 501(b) extends the jurisdiction of federal courts, its requirements are to be narrowly construed "so as not to reach beyond the limits intended by Congress." *Phillips v. Osborne*, 403 F.2d 826, 828 (9th Cir. 1968).

In his Complaint, the Plaintiff alleges that he "appealed the rejection of his [lost time] claims to defendant Hardin who rejected the appeal," that he "sought to further appeal the rejection of his claim through defendant Moore," and that "the appeal was denied with no explanation." Complaint ¶¶ 9, 10. These allegations show that the Plaintiff brought his personal grievance regarding his reimbursement to the attention of Hardin and Moore, but they hardly establish a demand that an action be brought to cure alleged breaches of fiduciary obligations by Hardin, Moore, and McKinney. "Failure to allege that the required request has been made has been held to require denial of leave to file the complaint." *Flaherty v. Warehousemen, Garage & Service Station Employees' Local Union No. 334*, 574 F.2d 484, 487 (9th Cir. 1978). Even if the Court were to consider the letters to President Hardin from the Plaintiff's attorney, which were filed with the Court by the Defendants in support of their Motion to dismiss, it would still reach the same conclusion that the Plaintiff failed to meet the demand requirement of § 501(b). *See Agola v. Hagner*, 556 F. Supp. 296, 301 (E.D.N.Y. 1982) (union members' letter to union demanding support of union during strike, notifying union that strike benefits were behind in payment and had apparently been ceased, and threatening to institute legal action should union not respond and give its support by a certain date held insufficient to satisfy demand requirement of § 501(b)).

In the present case, the Plaintiff has never requested leave of court to file his Complaint as required by § 501(b). The "leave of court" requirement is designed to protect union officials from harassing, vexatious litigation. *Morrissey v. Curran*, 423 F.2d 393 (2d Cir. 1970). The Complaint that was filed was not verified, so it cannot even be treated as a proper application for leave of court to proceed with the suit. The Plaintiff did file an affidavit in response to the Defendants' Motion to dismiss or for summary judgment over five months after he filed his Complaint. That affidavit, however, does not include sufficient allegations that he demanded that an action be brought against the present Defendants for breaches of their fiduciary obligations to the organization.

Most significantly, the Plaintiff's Complaint is defective in that it does not seek relief "for the benefit of the labor organization." 29 U.S.C. § 501(b). As noted by the Ninth Circuit in *Phillips v. Osborne*, 403 F.2d 826, 831 (9th Cir. 1968), Congress apparently turned to the concept of the shareholders' derivative suit when designing the procedures by which union members could fulfill their "policing functions" within their labor organization. The Ninth Circuit elaborated on the nature of such a suit by stating:

> The basic principle of the derivative suit is that the duties allegedly violated by corporate officers are owed to the organization and only secondarily or derivatively to the shareholder as representative of all shareholders.
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> .....
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> In the derivative context, a necessary corollary of the principle that the duties of officers are owed to the organization is that any relief obtained by the plaintiff in such litigation shall benefit the corporation as a whole and not the suing individual directly. Correspondingly, Section 501(b) makes it clear that relief granted under Section 501 is for the benefit of the real party in interest, the union whose officers are charged with dereliction.

Id. at 831.

The Plaintiff obviously has not brought this suit on behalf of the Union, but rather for his own benefit. The Court notes that the Plaintiff seeks reimbursement of the money disallowed him for "time lost" because of an alleged "prior approval" policy applied against him. Although he alleges in his Complaint that the Defendants subsequently required him to pay claims of other union members in contravention of the "prior approval" policy, his prayer for relief does not include a request that the Defendant be enjoined to require repayment to the Union of expenses paid to those other union members in the event such a policy in fact does exist. He simply seeks vindication of his own right to the money that he was required to repay and a declaration that the Defendants' conduct was unlawful.

Because the Plaintiff has not satisfied the requirements of § 501(b), his claim pursuant to § 501(a) should be dismissed.

Finally, the Defendants seek dismissal of the Plaintiff's state law quantum meruit and implied contract claims on the ground that they are barred by the federal doctrine of preemption since they arise out of the same actions he alleges constitute violations of the LMRDA. 29 U.S.C. § 413 explicitly provides, however, for retention of the rights of union members under state law:

> Nothing contained in this subchapter shall limit the rights and remedies of any member of a labor organization under any State or Federal law . . . .

29 U.S.C. § 523 contains similar language which negates the Defendants' contention that the Plaintiff's state law claims are preempted by Title V of the LMRDA. Therefore, the plaintiff's pendent state law claims should not be dismissed.

NOW, THEREFORE, IT IS ORDERED that:

(1) The Defendants' Motion to dismiss the Plaintiff's claim pursuant to 29 U.S.C. § 411 is *DENIED;*

(2) Because the Court is satisfied that its ruling on the timeliness of the Plaintiff's claim under 29 U.S.C. § 411 involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from this ruling may advance the ultimate termination of the litigation, the Defendants may apply to the United States Court of Appeals for the Fourth Circuit within ten (10) days of the date this Order is filed for permission to appeal this ruling pursuant to 28 U.S.C. § 1292(b);

(3) The Defendants' Motion to dismiss the Plaintiff's claim pursuant to 29 U.S.C. § 501 is *GRANTED;*

(4) The Defendants' Motion to dismiss the Plaintiff's state law claims is *DENIED;* and

(5) Should the Defendants apply for an interlocutory appeal pursuant to 28 U.S.C. § 1292(b), that application shall stay all proceedings in this Court.

This the 30th day of April, 1986.

/s/ Robert D. Potter
ROBERT D. POTTER, CHIEF
UNITED STATES DISTRICT
JUDGE

(Certificate of Service omitted in printing)